LEMBAGA PEMBANGUNAN LANGKAWI v. SMART UNITY SDN BHD

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
IDRUS HARUN JCA
BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: K-02-2201-10-2013]
17 FEBRUARY 2017

CONTRACT: *Termination – Joint venture agreement ('JVA') – Whether breach of agreement established – Whether works commenced – Issuance of notice to remedy breaches – Failure by plaintiff to remedy breaches within period stipulated – Inordinate delay of seven years to undertake project under JVA – Whether JVA lawfully terminated*

On 25 October 2001, the plaintiff as the developer and the defendant as the landowner entered into a joint venture agreement ('JVA') to develop two pieces of land ('land A and land B') on a joint venture basis. Land A was registered in the name of the defendant on 30 March 2002 whilst land B was registered on 6 March 2007. Pursuant to cl. 2 of the JVA, the plaintiff and the defendant agreed to jointly set up and incorporate a private limited company ('JV company') to undertake the JV project. Pursuant to the Board of the JV company's allotment of the subscription of shares, the plaintiff was required under cls. 4.1, 4.2, 4.2.1 and 4.2.2 to the JVA to pay a sum of RM2 million within six months from the date of execution of the JVA and the defendant was required to effect an immediate transfer of land A and land B to the JV company. However, no transfer of the lands was effected by the defendant. On 20 June 2002, the plaintiff entered into a loan agreement with a third party company, Mableton Consultants Ltd ('Mableton') to obtain financing facilities of RM3 million to fund the project and as security, the defendant charged land A to Mableton. Subsequently, the defendant invited the plaintiff to give presentations of the development plans for the project. Thereafter, the plaintiff requested from the defendant the amount of premium payable by the plaintiff for land B. There was no response from the defendant. Instead, the defendant issued a notice to the plaintiff to remedy various breaches, alleged to have been committed by the plaintiff, within 14 days. In its response to the notice of breach, the plaintiff stated, amongst others, that the defendant was in breach of the JVA for its failure to transfer land A and land B to the JV company and was required to remedy the breach by transferring land A and land B immediately to the JV company. The defendant thus issued a notice of termination of the JVA dated 21 October 2008 and the reason stated therein was that the plaintiff had failed to remedy the breaches within 14 days and had failed to repay the RM3 million loan to Mableton. The plaintiff thus commenced an action, essentially to claim for a declaration that the notice of termination of the JVA was unlawful and for an order for specific performance of the JVA and damages. The defendant

counterclaimed, *inter alia*, for a declaration that the JVA was lawfully terminated, that the plaintiff had breached the JVA and the plaintiff surrenders the title to land A free of encumbrances. The High Court Judge ('HCJ') allowed the plaintiff's claim and dismissed the defendant's counterclaim. Hence, this appeal.

Held (allowing appeal with costs)
Per Badariah Sahamid JCA delivering the judgment of the court:

(1) It was a term of the JVA that required the incorporation of the JV company and capitalisation of the JV company in the respective proportions of 70% shares for the plaintiff and 30% to the defendant to raise the total issue share capital to RM5 million. The plaintiff had failed to pay the initial subscription amount of RM2 million in the time period stipulated by cl. 4.2.1. Almost seven years after the execution of the JVA, there was no evidence that there was any attempt by the plaintiff to pay even a part of the sum, or at the very least a proposal for an extended time to restructure payment. Therefore, it was clear that the plaintiff was not able and willing to undertake the project. (paras 55 & 58)

(2) A company search on the JVA showed the company which was incorporated since 2001 to be a dormant RM2 company. The RM3 million taken by the plaintiff by charging the defendant's land A was not shown to have been used for the benefit of the JV company and also remained unpaid. Thus, the plaintiff had no financial ability to undertake the project. (para 59)

(3) There was no evidence to show that after the execution of the JVA and incorporation of the JV company in 2001 that works on the project had commenced. In view of the breaches of the JVA by the plaintiff as well as the failure of the plaintiff to demonstrate the ability and willingness to undertake the project after a period of almost seven years from the date the JVA was executed, the defendant was entitled to issue the notice of remedy and on the failure of the plaintiff to rectify the breaches within the period stipulated in the notice, to terminate the JVA. Accordingly, the termination of the JVA was lawful. (paras 60 & 64)

(4) The JV company had not been properly incorporated nor capitalised as the plaintiff had failed to pay the RM2 million stipulated under cl. 4.2.1 of the JVA. Thus, it would be premature to transfer lands A and B or deliver vacant possession of the said lands. In any event, since land A was used as collateral for the RM3 million loan taken by the plaintiff and the loan had not been repaid, the charge on land A had not been discharged. Thus, the defendant was not in a position to transfer or deliver vacant possession of land A to the plaintiff. (para 66)

(5) The HCJ had erred in awarding the plaintiff an order for specific performance of the JVA. Generally, specific performance is not granted for construction contracts as their performance would require continuous supervision. Further, a party cannot obtain an order for specific performance if he himself has breached obligations and is not ready and able to perform his obligations. The plaintiff had not shown himself to be ready, able and willing to undertake the project. In addition, there was indisputable evidence that there was an inordinate delay of almost seven years on the part of the plaintiff to undertake the project under the JVA. (paras 67, 68 & 70)

(6) The HCJ had also erred in making a finding that the plaintiff had suffered losses and thus was entitled to the damages prayed for when such a finding was clearly unsupported by any oral or documentary evidence. It was the defendant who had suffered losses consequent to the plaintiff's breach of the JVA, in particular, losses arising from the charge on land A to Mableton, where the RM3 million loan and accrued interest remains outstanding. (paras 71 & 72)

Bahasa Malaysia *Headnotes*

Pada 25 Oktober 2001, plaintif sebagai pemaju dan defendan sebagai pemilik tanah memasuki perjanjian usaha sama ('JVA') untuk membangunkan dua bidang tanah ('tanah A dan tanah B') atas dasar usaha sama. Tanah A didaftarkan atas nama defendan pada 30 Mac 2002 manakala tanah B didaftarkan pada 6 Mac 2007. Menurut kl. 2 JVA, plaintif dan defendan bersetuju untuk bersama-sama menubuhkan dan memperbadankan syarikat sendirian berhad ('syarikat JV') untuk menjalankan projek JV tersebut. Menurut peruntukan Lembaga syarikat JV bagi mohon beli saham, plaintif diperlukan bawah klausa-klausa 4.1, 4.2, 4.2.1 dan 4.2.2 JVA membayar sejumlah RM2 juta dalam tempoh enam bulan dari tarikh pemeteraian JVA dan defendan diperlukan memindah milik dengan serta merta tanah A dan tanah B kepada syarikat JV. Walau bagaimanapun, pindah milik tanah-tanah tersebut tidak dibuat oleh defendan. Pada 20 Jun 2002, plaintif memasuki perjanjian pinjaman dengan syarikat pihak ketiga, Mableton Consultants Ltd ('Mableton') untuk memperoleh kemudahan kewangan sejumlah RM3 juta bagi membiayai projek dan sebagai jaminan, defendan menggadai tanah A pada Mableton. Kemudian, defendan mempelawa plaintif memberi pembentangan pelan kemajuan bagi projek tersebut. Selepas itu, plaintif memohon daripada defendan jumlah premium yang perlu dibayar plaintif bagi tanah B. Tiada jawapan daripada defendan, sebaliknya, defendan mengeluarkan notis untuk plaintif membetulkan, dalam tempoh 14 hari, pelbagai pelanggaran yang didakwa dilakukan plaintif. Sebagai jawapan bagi notis pelanggaran, plaintif menyatakan, antara lain, bahawa defendan telah melanggar JVA atas kegagalannya memindah milik tanah A dan tanah B kepada syarikat JV dan diperlukan memulihkan pelanggaran tersebut dengan

memindah milik tanah A dan tanah B dengan segera kepada syarikat JV. Defendan, oleh itu, mengeluarkan notis penamatan JVA bertarikh 21 Oktober 2008 dan alasan yang terkandung di dalamnya adalah bahawa plaintif gagal membetulkan pelanggaran dalam tempoh 14 hari dan gagal membayar semula pinjaman RM3 juta kepada Mableton. Plaintif, oleh itu, memulakan tindakan, inti patinya, menuntut deklarasi bahawa notis penamatan JVA tidak sah dan perintah pelaksanaan spesifik bagi JVA serta ganti rugi. Defendan menuntut balas, antara lain, bagi deklarasi bahawa JVA ditamatkan secara sah, bahawa plaintif telah melanggar JVA dan plaintif mengembalikan hak milik tanah A tanpa apa-apa beban. Hakim Mahkamah Tinggi ('HMT') membenarkan tuntutan plaintif dan menolak tuntutan balas defendan. Dengan itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Badariah Sahamid HMR menyampaikan penghakiman mahkamah:

(1) Terma JVA memerlukan pemerbadanan syarikat JVA dan permodalan syarikat JVA masing-masing dalam bahagian 70% saham bagi plaintif dan 30% bagi defendan untuk mengumpul jumlah terbitan modal saham sebanyak RM5 juta. Plaintif gagal membayar jumlah awal mohon beli saham sebanyak RM2 juta dalam tempoh yang dinyatakan dalam kl. 4.2.1. Hampir tujuh tahun selepas pemeteraian JVA, tiada bukti bahawa apa-apa cubaan dibuat plaintif untuk membayar walau sebahagian jumlah atau sekurang-kurangnya cadangan bagi masa tambahan untuk menyusun semula pembayaran. Oleh itu, jelas bahawa plaintif tidak boleh dan tidak bersedia untuk menjalankan projek tersebut.

(2) Carian syarikat atas JVA menunjukkan syarikat itu yang diperbadankan semenjak 2001 adalah syarikat RM2 yang dorman. Jumlah RM3 juta yang diambil oleh plaintif dengan menggadai tanah A defendan tidak ditunjukkan telah digunakan bagi faedah syarikat JV dan kekal tidak dibayar. Oleh itu, plaintif tiada keupayaan kewangan untuk menjalankan projek itu.

(3) Tiada keterangan untuk menunjukkan bahawa selepas pemeteraian JVA dan pemerbadanan syarikat JV pada 2001, kerja-kerja bagi projek itu telah bermula. Berikutan pelanggaran JVA oleh plaintif dan kegagalan plaintif menunjukkan keupayaan dan kesediaan untuk menjalankan projek selepas tempoh hampir tujuh tahun dari tarikh pemeteraian JVA, defendan berhak untuk mengeluarkan notis remedi dan atas kegagalan plaintif membetulkan pelanggaran dalam tempoh yang dinyatakan dalam notis, untuk menamatkan JVA. Dengan itu, penamatan JVA adalah sah.

(4) Syarikat JV tidak diperbadankan dan dipermodalkan dengan sewajarnya kerana plaintif gagal membayar RM2 juta yang dinyatakan di bawah kl. 4.2.1 JVA. Oleh itu, adalah pramatang untuk memindah milik tanah

A dan B atau menyerahkan milikan kosong tanah-tanah tersebut. Walau apa pun, oleh sebab tanah A digunakan sebagai kolateral bagi pinjaman RM3 juta yang diambil oleh plaintif dan pinjaman tersebut belum dibayar, gadaian atas tanah A belum dilepaskan. Dengan itu, defendan tidak boleh memindah milik atau menyerahkan milikan kosong tanah A kepada plaintif.

(5) Hakim Mahkamah Tinggi khilaf apabila mengawardkan plaintif perintah pelaksanaan spesifik bagi JVA. Umumnya, pelaksanaan spesifik tidak diberikan bagi kontrak pembinaan kerana pelaksanaannya akan memerlukan penyeliaan berterusan. Selanjutnya, sesuatu pihak tidak boleh memperoleh perintah bagi pelaksanaan spesifik jika dia sendiri telah melanggar kewajipannya dan tidak bersedia dan berupaya melaksanakan tanggungjawabnya. Plaintif sendiri tidak menunjukkan bahawa ia bersedia, boleh dan berupaya menjalankan projek tersebut. Tambahan lagi, terdapat keterangan yang tidak boleh dipertikaikan bahawa terdapat kelewatan tidak wajar selama hampir tujuh tahun pada pihak plaintif untuk menjalankan projek bawah JVA itu.

(6) Hakim Mahkamah Tinggi juga khilaf dalam membuat dapatan bahawa plaintif mengalami kerugian dan oleh itu berhak mendapat ganti rugi yang dipohon apabila dapatan sebegitu jelas tidak disokong oleh apa-apa keterangan lisan atau dokumentar. Defendan yang mengalami kerugian akibat pelanggaran JVA oleh plaintif, khususnya, kerugian yang timbul daripada gadaian tanah A kepada Mableton, di mana pinjaman RM3 juta dan faedah terakru masih tertunggak.

Case(s) referred to:

Dr M Mahadevan Mahalingam v. S Lourdenadin & Another Case [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168 SC ***(refd)***

Ha Securities Sdn Bhd v. Ng Kong Yeam [1993] 4 BLJ 41 HC ***(refd)***

Mawar Awal (M) Sdn Bhd v. Kepong Management Sdn Bhd & Anor [2005] 7 CLJ 296 HC ***(refd)***

Zainab Mohamed v. Syarikat Permodalan Johor (PP) Sdn Bhd [1998] 4 CLJ (Supp) 262 HC ***(refd)***

Legislation referred to:

Lembaga Pembangunan Langkawi Act 1990, s. 3

Specific Relief Act 1950, ss. 20(1)(g), 23(b)

For the appellant - Karin Lim & Shamshul Jamil; M/s Presgrave & Matthews
For the respondent - T Prem Anand & Jeannie Chong; M/s Deol & Gill

[Editor's note: Appeal from High Court, Alor Setar; Civil Suit No: 22-67-2010 (overruled).]

Reported by S Barathi

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JUDGMENT

Badariah Sahamid JCA:

Introduction

B **[1]** This is an appeal against the decision of the learned High Court Judge given on 26 August 2013 after a full trial, allowing the plaintiff's claim and dismissing the defendant's counterclaim.

[2] The plaintiff's claim was essentially for a declaration that a notice of termination of a joint venture agreement ("JVA") dated 21 October 2008 was C unlawful, an order for specific performance of the JVA, as well as damages.

[3] The defendant's counterclaim was essentially for a declaration that the JVA was lawfully terminated, that the plaintiff had breached the JVA, that the plaintiff surrenders the title to land A free of encumbrances, an injunction to prevent the plaintiff from interfering with dealings by the defendant on D land A and B, an order that the plaintiff cancels any caveat or restriction on land A and B within 14 days and damages.

Background Facts

Parties will be referred to as they were in proceedings before the High Court.

E **[4]** The plaintiff is a company incorporated in Malaysia involved in the business of construction and development.

[5] The defendant is a body corporate established under s. 3 of the Lembaga Pembangunan Langkawi Act 1990, to undertake the development of tourism and infrastructure, including residential and commercial F development in Langkawi, Kedah.

[6] On 25 October 2001, the plaintiff as developer and the defendant as land owner entered into the JVA (a joint venture agreement) to develop two pieces of land situated in Pulau Tepur, (described as land A and land B) by the building of luxury bungalows and a five star spa resort on a joint venture G basis.

[7] At the date of the execution of the JVA, the titles to land A and land B had yet to be issued and registered in the name of the defendant.

[8] Land A was registered in the name of the defendant on 30 March 2002 H whereas land B was registered in the name of the defendant on 6 March 2007.

[9] The essential terms of the JVA may be summarised as follows. Pursuant to cl. 2 of the JVA, the plaintiff and the defendant agreed to jointly set up and incorporate a private limited company to be known as Pulau Tepur Development Sdn Bhd ("JV company") to undertake the joint venture I project, ("the project").

Clause 2 reads as follows:

(i) Immediately following the execution of the JV agreement parties shall apply for the incorporation of the JV company under the name of Pulau Tepur Sdn Bhd.

[10] Pursuant to cl. 1.1 and cl. 4.1 of the JVA, the authorised share capital of the JV company is 5,000,000 with the plaintiff subscribing 70% and the defendant 30% of the shares in the JV company.

[11] Clause 6.2 and cl. 3.1, 3.1.1, 3.1.2 of the JVA provide that within 30 days of the execution of the JVA, the plaintiff is required to nominate two of its representatives, and the defendant is required to nominate one representative to sit as directors on the board of the JV company. ("the board")

[12] Following the aforesaid appointments, a board meeting of the JV company would convene to allot the shares in the JV company based on the agreed proportion of shares in accordance with cls. 1 and 4 of the JVA.

[13] On the board's allotment of the subscription of shares, the plaintiff is then required under cls. 4.1, 4.2, 4.2.1 and 4.2.2 of the JVA to pay a sum of RM2 million within six months from the date of execution of the JVA, and the defendant was required to effect an immediate transfer of land A and land B to the JV company.

[14] However, notwithstanding that the sum of RM2 million aforesaid has not been paid, under cl. 4.3 both the plaintiff and the defendant are entitled to exercise their rights as registered owners of the shares subscribed in the agreed proportions.

[15] The abovementioned clauses are reproduced below;

> 4.1 The Parties to the JV Agreement shall subscribe in the agreed proportion for such number of shares so as to raise the total issued capital of the JV Company to the sum of RM5,000,000.00
>
> 4.2 The Parties shall ensure that the JV Company allot the required number of Shares to the respective Parties in accordance with the provisions of sub clause 4.1 against the following consideration:
>
> > 4.2.1 in the case of the Developer a payment of a sum of RM2,000,000.00 following the execution of this Agreement and a payment of a sum of RM1,800,000.00 not more than 6 months thereafter; and
> >
> > 4.2.2 in the case of the Landowner the immediate transfer of Land A and all its rights over Land A free of any encumbrance to the JV Company and transfer of Land B and all its rights over Land B free of any encumbrances to the JV Company upon the issuance of titles of Land B by the relevant authorities.

A 4.3 Notwithstanding the payment set out in clause 4.2.1 above has not been paid or paid in full the Parties shall be entitled to exercise all their rights as registered owner of the said shares allotted to them from the date of the said allotment;

Covenants Of The Landowner Under The JVA

B **[16]** As landowner, the defendant had covenanted to undertake the following under the JVA. To summarise:

(i) the defendant shall immediately upon the issuance of title of land A and B by relevant authorities, agree to the same being transferred to the JV company;

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(ii) the defendant shall, upon request by the JV company, deliver vacant possession of land A and land B to the JV company to enable commencement of works on the project;

(iii) the defendant will immediately after the execution of the JVA deliver all necessary documents to the JV company to enable the JV company to proceed to make all necessary planning and negotiation for submission of plans to the relevant authorities;

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(iv) the defendant will assist the JV company to obtain all the licences, sales and advertising permits and all approvals from the relevant authorities in respect of the project;

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(v) the defendant will contribute to the cost of infrastructure works on land A and land B until the issuance of CFO by the relevant authorities, where the amount of contribution shall not exceed the amount of premium payable on land B.

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Covenants Of The Developer Under The JVA

[17] As developer, the plaintiff had covenanted to undertake the following under the JVA. In summary:

G (a) The plaintiff shall assist the JV company to acquire sufficient financing facilities from financial institutions for completion of the project including but not limited to the following:

All costs arising from or in connection with the project including payments of premiums, survey fees, architect fees, engineering fees, consultants fees, sub-division and issuance of individual titles, quit rent, building costs, all plans fees and all other payment necessary for the due completion of the construction and development and sale of the project.

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(i) the premium for land B, other premiums, survey fees and all other outgoings;

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(ii) all costs incidental to the assignment of land A and land B from the landowner to the JV company; and

(iii) taxes payable by both the landowner and the developer in respect of the portions agreed for the capitalisation of the JVA.

(b) The developer shall also provide all the expertise, skills and manpower to the JV company necessary for the completion of the project including but not limited to the following:

(i) obtain licenses, approvals and permits as requested by the relevant authorities;

(ii) diligently construct all roads, driveways, drains, culverts, electric cables, water reticulation, septic tanks and other related installations on land A and land B in accordance with requirements of relevant authorities;

(iii) indemnify and keep indemnified the landowner from and against all legal liability in respect of loss, damage, actions, proceedings, suits, claims, demands costs and expenses arising from land A and land B; and

(iv) administer and carry out all the sales and management of the project.

[18] There is no time frame stipulated in the JVA for parties to commence and complete the development of the project.

Chronology Of Events

[19] The JVA was executed on 1 November 2001. Thereafter on 15 November 2001, the plaintiff set up and registered the JV company under the name of Pulau Tepur Development Sdn Bhd and nominated two of its directors to sit on the board of the JV company with an initial authorised capital of RM1,000,000.

[20] On 30 March 2002, land A was registered in the name of the defendant. However, no transfer of land A was effected by the defendant to the JV company as required by cl. 10.1 of the JVA.

[21] On 20 June 2002, the plaintiff entered into a loan agreement with a third party company known as Mableton Consultants Limited ("Mableton") to obtain financing facilities of RM3 million to assist the plaintiff in funding the project.

[22] As security for the said loan, the defendant had charged land A to Mableton. A charge dated 20 June 2002 with presentation no. 600/2002 was executed by the defendant.

[23] On 6 March 2007, land B was registered in the name of the defendant. However, no transfer of land B was effected by the defendant to the JV company as required by cl. 10.4 of the JVA.

[24] *Vide* letters dated 16 July 2008 and 28 July 2008, the defendant had invited the plaintiff to give presentations of the development plans for the project at the defendant's office.

[25] *Vide* a letter dated 29 July 2008 the plaintiff had requested from the defendant for the amount of premium to be payable by the plaintiff for land B and confirmed the minutes of the presentation given by the plaintiff at the office of the defendant on 28 July 2008.

[26] There was no response from the defendant on the premium details in respect of land B.

Notice To Remedy Breach

[27] On 25 September 2008, the defendant had issued the plaintiff a notice to remedy breach dated 25 September 2009 to remedy various alleged breaches under the JVA within 14 days, pursuant to cl. 15 of the JVA. ("notice of breach")

[28] The breaches alleged to have been committed by the plaintiff in the notice of breach are summarised as follows:

(a) failure to register the defendant's 30% share in the JV company;

(b) failure to register the name of an officer of the defendant as a director in the JV company;

(c) obtaining a loan of RM3 million by charging land A, which is owned by the defendant to Mableton for the use of the JV company;

(d) wrongfully acquired, kept and utilised the abovementioned loan for the plaintiff's use;

(e) failure to execute and complete the project.

Plaintiff's Response To Notice Of Breach

[29] By way of a letter dated 9 October 2008, the plaintiff responded to the defendant's notice of breach, as summarised below:

(i) request that the defendant furnish the plaintiff the details of the defendant's nominee to be appointed as a director of the JV company;

(ii) the defendant is put under notice to transfer land A and land B with immediate effect to the JV company, in accordance with the JVA;

(iii) the defendant's allocation of the 30% of the shareholding in the JV company is subject to the defendant's transfer of land A and land B to the JV company;

(iv) The defendant is in breach of the JVA for its failure to transfer land A and land B to the JV company, and is required to remedy the breach by transferring land A and land B immediately to the JV company.

[30] On 21 October 2008, the defendant issued a notice of termination of the JVA dated 21 October 2008 ("the notice"). The reason for the termination given in the notice was that the plaintiff had failed to remedy the breaches within 14 days and had failed to repay the RM3 million loan to Mableton.

The Plaintiff's Claim

[31] The plaintiff's claim against the defendant may be summarised as follows:

(a) a declaration that that the termination notice dated 21 October 2008 is unlawful and void;

(b) a declaration that the JVA is valid;

(c) an order for specific performance of the JVA;

(d) an injunction to prevent the defendant from disposing of lands A and B; and

(e) damages for breach of contract. The defendant's counterclaim

[32] The defendant's counterclaim against the plaintiff may be summarised as follows:

(a) a declaration that the JVA has been lawfully terminated;

(b) a declaration that the plaintiff has breached the JVA;

(c) an order that the plaintiff redeem the charge on land A within 14 days;

(d) a declaration that the JVA is void for being in contravention of the Kedah Malay Reserve Enactment;

(e) an injunction that the plaintiff surrenders the title to land A free of encumbrances;

(f) an injunction to prevent the plaintiff from dealing with land A and land B;

(g) an order that the plaintiff give a full and complete account of the loan taken by it under the charge on land A;

(h) an order that the plaintiff pays damages suffered by the defendant; and

(i) interest and costs.

Issues Before The High Court

[33] The learned High Court Judge summarised the issues before him as follows.

(a) Whether the plaintiff had breached the JVA and if so, whether the breach can be rectified?

(b) Whether the defendant was entitled to terminate the JVA and whether such termination was lawful?

(c) Whether the JVA contravenes the Malay Reserve Land Enactment?

(d) Whether the JVA may be enforced by specific performance?

(e) Whether the plaintiff is able to undertake the project?

(f) Whether the plaintiff had suffered losses consequential to the termination of the JVA?

(g) Whether the defendant has proven his counterclaim against the plaintiff?

Findings And Decision Of The High Court

[34] The learned High Court Judge had allowed the plaintiff's claim and dismissed the defendant's counterclaim with costs.

[35] The grounds for the decision is set out below.

[36] The plaintiff had not breached the JVA. The plaintiff had set up the JV company and had appointed two of its directors to the board. The plaintiff had contacted the defendant to nominate its director to the board as required (cls. 3.1, 3.1.1, 3.1.2 and 6.2 of JVA) but there was no response from the defendant. Thus the plaintiff was unable to commence the project as well as to subscribe for shares in the JV company.

[37] The learned High Court Judge made a finding that it was the defendant who had breached the JVA. Even if the plaintiff had breached the JVA, the breach was capable of being remedied.

[38] The defendant was entitled to terminate the JVA. However, the termination must be lawful and in compliance with the terms of the JVA. In the instant case the defendant had failed to co-operate with the plaintiff to ensure compliance with the terms of the JVA. Since the primary breach was committed by the defendant, the termination was unlawful.

[39] The defendant has been declared a Malay pursuant to s. 19 of the Malay Reserve Enactment Kedah. In addition, land A and land B are still owned and registered in the defendant's name. The JVA does not contravene the Malay Reserve Enactment Kedah. The JVA is lawful, has been stamped and is enforceable.

[40] Joint venture agreements may be enforceable by specific performance, as was decided by the cases of *Mawar Awal (M) Sdn Bhd v. Kepong Management Sdn Bhd & Anor* [2005] 7 CLJ 296; [2005] 6 MLJ 132 and *Zainab Mohamed v. Syarikat Permodalan Johor (PP) Sdn Bhd* [1998] 4 CLJ (Supp) 262; [1998] MLJ 492.

[41] From the evidence adduced, the plaintiff is capable of undertaking the project if the defendant had given his co-operation. The delay in commencing the project was due to the failure of the defendant to respond to the plaintiff's request. In addition, in 2008, the defendant had requested the plaintiff to make a presentation on the project. The conduct of the defendant showed the defendant was still interested to undertake the project with the plaintiff even though time was of the essence, according to cl. 21 of the JVA. If the defendant had intended to terminate the JVA, they need not have invited the plaintiff to give a presentation on 28 July 2008. They must give notice to the plaintiff to explain why the project was stalled, to enable the plaintiff to take the necessary action. If no action was taken by the plaintiff, the JVA can be terminated.

[42] The plaintiff had suffered losses and thus was entitled to the damages prayed for.

[43] From the testimonies of the witnesses for the defendant, SD1-SD3, they have not proven their losses.

[44] In conclusion the learned High Court Judge found the plaintiff had succeeded in proving its claim against the defendant. The defendant had failed to prove its counterclaim against the defendant. Accordingly, the defendant's counterclaim was dismissed.

Grounds Of Appeal

[45] The defendant's grounds of appeal may be summarised as follows:

(a) The learned judge had erred in law and in fact in making a finding that the plaintiff had not breached the terms of the JVA. On the contrary the plaintiff had committed breaches that were fundamental to the JVA, the said breaches are as follow:

(i) the failure to pay RM2 million under cl. 4.2 of JVA;

(ii) the failure to repay the loan of RM3 million with interest to Mapleton within the period of ten months and further to release the charge on land A;

(iii) the failure to appoint a representative of the defendant to the board of the JV company. The request for nomination was only made by the plaintiff to the defendant in 2008, seven years after the execution of the JVA;

(iv) the failure to utilise the loan of RM3 million for the benefit of the JV company and conversely, utilising the said loan amount for the benefit of the plaintiff;

A (v) the failure to perform its fundamental and initial obligations, including the failure to deliver development plans. The same was only given on 29 July 2008, almost seven years after the execution of the JVA.

B (b) The learned judge had erred in making the finding that the plaintiff had appointed two of its representatives to the board of the JV company and that the defendant had not responded to the plaintiff's request for nomination when in fact the request was only made in 2008.

C (c) The learned judge had erred in allowing the relief of specific performance when the evidence showed the plaintiff was not able and willing to undertake its obligations and there was inordinate delay in undertaking the project.

D (d) The learned judge had erred in making the finding that even if there was a breach committed by the plaintiff, the breach can be rectified. The learned judge failed to appreciate there were five breaches in the defendant's notice to remedy dated 25 September 2008. The plaintiff only attempted to remedy one of them ie, in respect of the nomination of the defendant's representative to the board of the JV company. The plaintiff had failed to rectify the other breaches.

E (e) The learned judge had failed to appreciate that on the failure of the plaintiff to rectify the said fundamental breaches, the defendant was entitled to terminate the JVA, and accordingly to find that the defendant's termination of the JVA was lawful.

F (f) The learned judge had erred in making a finding that the plaintiff had suffered losses when such a finding is not supported by any oral or documentary evidence.

G (g) The learned judge had erred in failing to appreciate the defendant could not transfer land A and land B to the JV company as the said company was not completely incorporated as it lacked capitalisation and the appointment of directors to the board of directors.

(h) The learned judge had failed to appreciate the fact that since Pulau Tepur was gazetted as a Geo Park by UNESCO, development of Pulau Tepur according to the JVA could not be undertaken.

H (i) The learned judge in dismissing the defendant's counterclaim had failed to appreciate that the defendant had suffered losses as the defendant's land A was charged for a RM3 million loan taken by the plaintiff and the plaintiff had failed to discharge the charge by repayment of the said loan.

I

Plaintiff Submissions

[46] The plaintiff submissions before us may be summarised as follows.

[47] The plaintiff had not committed any breaches of the JVA which entitles the defendant to terminate the JVA. The defendant's letter of termination to the plaintiff dated 21 October 2008 was therefore unlawful.

[48] In respect of the payment of RM2 million by the plaintiff to capitalise the shares in the JV company, this will only arise when the board of the JV company is properly constituted. Since the board has not been properly constituted, there is no immediate obligation by the plaintiff to pay the RM2 million. Further, the payment of the RM2 million does not arise until the defendant has transferred lands A and B to the JV company. To date the defendant has failed to transfer the said lands.

[49] There is no provision in the JVA which requires the plaintiff to repay the RM3 million loan from Mableton. The charge on land A as security for the said loan was consented to by the defendant in order to finance the project. In addition, the utilisation of land A and land B as collateral to finance the project is consistent with the objectives in the JVA. There is no evidence that the plaintiff had misused the RM3 million loan.

[50] The delay in completion of the project was attributable to the defendant's failure to comply with the terms of the JVA in the following ways:

(i) The defendant had taken no steps to incorporate and register the JV company. The defendant had also failed to nominate their representative as one of the three directors to the board of the JV company. This had resulted in the JV company being unable to convene a board meeting to allot shares in the JV company to the defendant and the plaintiff.

(ii) The defendant had failed to transfer land A and land B to the JV company as required by cl. 4.2.2 of the JVA. This resulted in the plaintiff being unable to commence any development work on the project.

(iii) The defendant had failed to deliver vacant possession of land A and land B to the JV company in order for the plaintiff to start the project.

(iv) The defendant had failed to deliver all necessary documents to the plaintiff to enable the plaintiff to make the necessary planning for submission of plans to the relevant authorities to enable the project to be started.

[51] The plaintiff avers that it is ready, willing and able to undertake the project as evidenced by the following:

(i) The plaintiff had taken steps to incorporate the JV company and to nominate its directors to the board.

(ii) The plaintiff had obtained a RM3 million loan to fund the project;

(iii) The plaintiff had prepared detailed brochures for the presentation to the defendant, undertaken detailed research on the development of Pulau Tepur, as well as feasibility studies of the project by experts and incurred expenses for the incorporation of the JV company as well as salaries and remuneration of staff and board members of the JV company.

[52] There is no cogent evidence to support the defendant's contention that the recognition of Pulau Tepur as a Geopark by UNESCO prevents the parties from developing Pulau Tepur as envisaged by the JVA. The Geopark membership certificate (p. 509 RR, jilid 3, bhg. C) is an ID document.

Our Judgment

[53] After careful consideration of learned counsels' oral and written submissions as well as the appeal records, we are of the unanimous opinion that the learned High Court Judge had made errors of fact and law that warrant appellate intervention. Accordingly, we allow the appeal with costs and set aside the decision of the learned High Court Judge. Our reasons are set out below.

[54] We agree with learned counsel for the defendant that from the evidence adduced, the plaintiff had committed breaches of the JVA which entitled the defendant to issue the notice of remedy dated 25 September 2008.

[55] It is a term of the JVA that requires the incorporation of the JV company and capitalisation of the JV company in the respective proportions of 70% shares for the plaintiff and 30% shares to the defendant to raise the total issued share capital to RM5 million.

[56] Clause 4.2.1 stipulates the plaintiff's obligation in the following terms: "In the case of the developer (plaintiff) a payment of a sum of RM200,000 following the execution of this agreement and a payment of a sum of RM1,800,000 not more than six months thereafter.

[57] It is not disputed that the plaintiff had failed to pay the sum of RM2 million. There was no cogent evidence to support the testimony of SP1 that the time of payment had been extended by mutual agreement. There is no documentary evidence to the effect and to date the amount remains unpaid.

[58] We further agree with the submission of learned counsel for the defendant that contrary to the weight of evidence adduced and the finding of the learned judge, the plaintiff was not able and willing to undertake the project. The failure of the plaintiff to pay the initial subscription amount of RM2 million in the time period stipulated by cl. 4.2.1 has already been referred to. Almost seven years after the execution of the JVA, there is no evidence that there was any attempt by the plaintiff to pay even a part of the sum, or at the very least a proposal for an extended time to restructure payment.

[59] A company search on the JVA showed the company which was incorporated since 2001 to be a dormant RM2 company. The RM3 million loan taken by the plaintiff by charging the defendant's land A was not shown to have been used for the benefit of the JV company, but also remains unpaid. Thus the plaintiff had no financial ability to undertake the project.

[60] Further, there is no evidence to show that after the execution of the JVA and the incorporation of the JV company in 2001, that work-even preliminary works on the project had commenced. While it is true that no time frame for completion of the project was stipulated in the JVA, the time taken must be reasonable. It does not make commercial sense that the time to complete the project be interpreted as being as it were, at large, and the plaintiff could take as long as it likes to complete the project.

[61] According to SD2, apart from two presentations of the project by the plaintiff, there were no reports of commencement of works by the plaintiff. According to SD3, the second presentation of the plaintiff was no different from the first presentation. In any event the second presentation was conducted on 28 July 2008, which was almost seven years after the execution of the agreement.

[62] The sum total of the work undertaken by the plaintiff in the period of almost seven years from the execution of the JVA appears to have been: incorporate the JV company, appoint its representatives to the board, conduct two presentations and obtain a loan of RM3 million, which loan has not been shown to have been utilised for the JV company.

[63] Thus, the learned High Court Judge had clearly misdirected himself in contending that the plaintiff was able and willing to undertake the project.

[64] In view of the breaches of the JVA committed by the plaintiff, as well as the failure of the plaintiff to demonstrate the ability and willingness to undertake the project after a period of almost seven years from the date the JVA was executed, we are of the opinion that the defendant was entitled to issue the notice of remedy and on the failure of the plaintiff to rectify the breaches within the period stipulated in the notice, to terminate the JVA. Accordingly, the termination of the JVA was lawful.

[65] In addition, we are of the view that the learned High Court Judge had erred in making the finding that the defendant was in breach of the JVA on the following grounds: One, failure to nominate a representative to the board of the JVA, failure to transfer lands A and B to the JV company as well as failure to deliver vacant possession of lands A and B to the JV company.

[66] The JV company has not been properly incorporated, nor capitalised as the plaintiff had failed to pay the RM2 million stipulated under cl. 4.2.1 of the JVA. Thus, it would be premature to transfer lands A and B or deliver vacant possession of the said lands. In any event since land A was used as collateral for the RM3 million loan taken by the plaintiff, and the loan has not been repaid, the charge on land A has not been discharged. Thus, the defendant was not in a position to transfer or deliver vacant possession of land A to the plaintiff. Land B was registered in the name of the defendant only on 6 March 2007.

[67] In addition, we agree with the submission of learned counsel for the defendant that the learned High Court Judge had erred in awarding the plaintiff an order for specific performance of the JVA.

[68] It is well established that specific performance is an equitable relief and awarded according to the particular circumstances of the case. Thus a party cannot obtain an order for specific performance if he himself has breached obligations and is not ready and able to perform his obligations. We have earlier stated grounds for our finding that the plaintiff has not shown himself to be ready, able and willing to undertake the project. In addition, there is indisputable evidence that there is an inordinate delay of almost seven years on the part of the plaintiff to undertake the project under the JVA.

(Refer to *Ha Securities Sdn Bhd v. Ng Kong Yeam* [1993] 4 BLJ 41; [1993] 3 MLJ 489; *Dr M Mahadevan Mahalingam v. S Lourdenadin & Another Case* [1988] 2 CLJ 601; [1988] 1 CLJ (Rep) 168; [1988] 2 MLJ 371)

[69] In addition, s. 23(b) of the Specific Relief Act 1950 provides that specific performance of a contract cannot be enforced in favour of a person, "who has become incapable of performing, or violates any essential term of the contract that on his part remains to be performed".

[70] In addition, the purpose of the JVA was to develop two pieces of land situated in Pulau Tepur, by the building of luxury bungalows and a five-star spa resort. Section 20(1)(g) of the Specific Relief Act 1950 states that among the contracts that cannot be specifically enforced are, "a contract the performance of which involves the performance of a continuous duty extending over a longer period than three years from the date". Specific performance is generally not granted for construction contracts as their performance would require continuous supervision.

[71] We agree with counsel for the plaintiff that the learned High Court Judge had erred in making a finding that the plaintiff had suffered losses and thus was entitled to the damages prayed for when such a finding was clearly unsupported by any oral or documentary evidence.

[72] We are also of the considered opinion that the defendant had suffered losses consequent on the plaintiff's breach of the JVA. In particular losses arising from the charge on land A to Mableton, where the RM3 million loan and accrued interest remains outstanding to date.

[73] In conclusion, the appeal is allowed with costs of RM40,000 here and below. The judgment of the learned High Court Judge is set aside. The counterclaim of the defendant/appellant is allowed as prayed. Deposit to be refunded to the appellant.